SUPREME COURT, U. S.

IN THE

Supreme Court, U.S.
FILED
JUL 24 1970
ROBERT SEAVER, CLERK

# Supreme Court of the United States

October Term, 1970

No. ..... 441

CLIFFORD DARRELL ISBELL,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

RAYMOND E. SUTTON,
324 South Third Street,
Las Vegas, Nevada 89101,
*Attorney for Petitioner.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

## SUBJECT INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statutory Provisions Involved | 2 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 7 |
| Conclusion | 11 |
| Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit | App. p. 1 |

## TABLE OF AUTHORITIES CITED

Cases — Page


Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) ..... 8

Calloway v. United States, 399 F. 2d 1006, U.S. App. D.C. (1968) ..... 8

Davis v. Sigler, 415 F. 2d 1159, 8th Cir. (1969) .... 8

Holt v. United States, 404 F. 2d 914, 10th Cir. (1968) ..... 10

Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1968) ..... 10

Menendez v. United States, 393 F. 2d 312, 5th Cir. (1968) ..... 8

United States v. Costello, 352 F. 2d 848, 2nd Cir. (1965) ..... 8

United States v. Guajardo-Melendez, 401 F. 2d 35, 7th Cir. (1968) ..... 7, 8

United States v. Kaufer, 406 F. 2d 550, 2nd Cir. (1969) ..... 10

United States v. Kelly, 399 F. 2d 692, 3rd Cir. (1968) ..... 8

United States v. Missler, 414 F. 2d 1293, 4th Cir. (1969) ..... 10

United States v. White, 405 F. 2d 838, 7th Cir. (1939), cert. granted, 394 U.S. 957 (1969) .... 10

Ziegler v. United States, 174 F. 2d 439, 9th Cir. (1949), cert. denied, 338 U.S. 822, 70 S. Ct. 68, 94 L. Ed. 499 1949) ..... 8

| Statutes | Page |
|---|---|
| United States Code, Title 18, Sec. 371 | 2 |
| United States Code, Title 21, Sec. 176(a) | 2, 4 |
| United States Code, Title 28, Sec. 1254(1) | 1, 4 |
| United States Code, Title 28, Sec. 1291 | 3, 4 |
| United States Code, Title 28, Sec. 1294 | 3, 4 |
| United States Code, Title 28, Sec. 1331 | 4 |

IN THE

# Supreme Court of the United States

October Term, 1970
No. .....

CLIFFORD DARRELL ISBELL,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

The petitioner Clifford Darrell Isbell respectfully prays that a writ of certiorari issue to review the judgment and opnion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 24, 1970.

## Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears annexed hereto. No opinion was rendered by the District Court for the District of Nevada.

## Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 24, 1970. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## Questions Presented.

1. Whether extra-judicial statements of a co-conspirator made not in furtherance of a conspiracy but implicating another co-conspirator can be received in evidence through the testimony of a third party.

2. Should a search warrant be required before a wired informant can enter a suspect's apartment and gain evidence against the suspect and others in the apartment.

## Statutory Provisions Involved.

United States Code, Title 18:

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

United States Code, Title 21:

§176a. Smuggling of marihuana; penalties; evidence; definition of marihuana

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being im-

ported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .

United States Code, Title 28:

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

United States Code, Title 28:

§1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code, Title 28:

§1294. Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . .

**Statement of the Case.**

The petitioner and other defendants, Bobby Randell Bates, Alan Randall Green and Nicholas Emanuel Pappas, not parties to this petition, were charged by indictment in the United States District Court for the District of Nevada with the crime of unlawfully conspiring to import marihuana, in violation of 21 United States Code §176(a), and each was found guilty of that charge. Additionally, Green and Pappas were also found guilty of unlawfully importing marihuana in violation of 21 United States Code §176(a).

The District Court had jurisdiction to hear and try the case under the provisions of 28 United States Code §1331. The United States Court of Appeals for the Ninth Circuit had jurisdiction to review the judgment of the District Court under the provisions of 28 United States Code §§1291-1294.

In December 1967, Jack Smith, who was in jail in Los Angeles, agreed to work for the government as an informant and to specifically assist the government in building a case against Pappas and Green who resided in Las Vegas. Upon his release from jail, Smith returned to Las Vegas, Nevada, contacted Pappas, who in turn contacted Green, and the three ultimately met and planned how to bring a load of marihuana into Las Vegas, Nevada from Mexico.

Pappas and Green raised money for the purchase of the marihuana and made trips to Culican and Calexico, Mexico to arrange for the purchase and de-

livery of the marihuana. In February, 1968, Smith and Pappas journeyed to Culican, Mexico to arrange for the purchase of 300 kilos of marihuana. Pappas, after purchasing the marihuana, stayed in Culican while Smith returned to Los Angeles and ultimately to Las Vegas to make arrangements to have the marihuana flown to Las Vegas. Pappas and Green lived together in the same apartment in Las Vegas; and, when Smith returned to Las Vegas, he went to their apartment and told Green what had occurred in Culican. At the apartment, Green, out of the presence of Isbell, told Smith that Isbell put up the first money in the marihuana deal. The next day, Pappas called the apartment long distance from Culican and spoke to Green. Isbell happened to be in the apartment, as was Smith and Brandi Harris. Isbell talked to Pappas on the extension telephone and asked him when he would be back and how "his" (Pappas') clothes got back into the apartment. After the telephone call ended, Isbell told Smith and Green that he was getting tired of the delay, that he had a lot of money invested in Nick Pappas and that he wanted to go East for a job and that he would have to go in one or two days for this job and that when this transaction transpired and the money came back that it was to be given to his wife, that she would know what it was about and take care of it. Green, later, out of the presence of Isbell, told Smith not to discuss any of the details in front of Isbell.

Because Green and Smith were unable to obtain a pilot to fly the airplane from Culican to Las Vegas,

Pappas left Culican and returned to Las Vegas. While in Las Vegas, the three contacted Bates, who was a pilot, and made a deal with Bates for him to fly to Culican, Mexico, pick up the marihuana and fly it under the rader screen back into the United States. On February 24, 1968, Bates and Smith flew to Culican, picked up the marihuana previously paid for by Pappas and flew the airplane back into Parker Lake, Arizona, where they were arrested. After the arrest, Smith and Bates flew the plane loaded with 300 kilos of marihuana to the North Las Vegas, Nevada airport. Pappas and Green met the airplane at the airport; and, at that time, by pre-arrangement with the arresting officers in Arizona, Pappas and Green were arrested. Petitioner Isbell was arrested some time later upon voluntary surrender.

## REASONS FOR GRANTING THE WRIT.

### 1. Incriminatory, Extra-Judicial Admissions by a Co-Conspirator of Another Co-Conspirator Through the Testimony of a Third Party Conflict With the Decisions of Other Courts of Appeals.

Co-conspirator Green, out of the presence of co-conspirator Isbell, told government informant Smith that Isbell had put up the first money for the marihuana purchase. Smith, over objection, was allowed to testify concerning Green's incriminatory statement about Isbell's investment. Objection was made to the admission of this portion of Smith's testimony and the case of *United States v. Guajardo-Melendez*, 401 F. 2d 35, 7th Cir. (1968) was cited and a motion for mistrial was made. The trial court denied the motion for mistrial.

The evidence pertaining to Isbell's participation in the conspiracy as charged comprised of:

(1) The statement made by Green to government informant Smith that Isbell had put up the first money in the deal; and

(2) Isbell's extension telephone conversation with Pappas while he chanced to be in the Pappas-Green apartment.

The Ninth Circuit Court in its opinion, at least impliedly, held the motion for mistrial might have been granted had the proper objection been made. The testimony of Smith was a recitation of a co-conspirator's statement against another co-conspirator's interest and was not admissible as an exception to the hearsay rule.

The decision of the Ninth Circuit conflicts with the Seventh Circuit case of *United States v. Guajardo-Melendez, supra,* which held that testimony of this type was inadmissible. The Ninth Circuit decision on this point would also appear to be in conflict with *United States v. Costello,* 352 F. 2d 848, 2nd Cir. (1965); *United States v. Kelly,* 399 F. 2d 692, 3rd Cir. (1968); *Menendez v. United States,* 393 F. 2d 312, 5th Cir. (1968); *Davis v. Sigler,* 415 F. 2d 1159, 8th Cir. (1969); and *Calloway v. United States,* 399 F. 2d 1006, U.S. App.D.C. (1968). These cases follow *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), when cited for the proposition that there has been a denial of the right of cross-examination as guaranteed by the Sixth Amendment. During the trial, co-conspirator Green testified and generally denied his complicity in the conspiracy. Green was not questioned on direct examination by his counsel concerning the incriminating statement he made about Isbell to Smith. Neither was he cross-examined by Isbell's counsel. The rule has long been that cross-examination must be related to direct examination. Had Green been questioned concerning his admissions to Smith about Isbell, it would have been improper cross-examination. Additionally, Green could have asserted his privilege against self-incrimination which would not have been waived by his direct testimony. *Ziegler v. United States,* 174 F. 2d 439 9th Cir. (1949), cert. denied, 338 U.S. 822, 70 S. Ct. 68, 94 L. Ed. 499 (1949). After Smith testified and incriminated Isbell, the door was judicially closed and Isbell was bound by the testimony of Smith and could not cross-examine Green.

**2. Testimony of the Wired Informant Smith Concerning the Participation of the Co-Conspirators in the Scheme Should Have Been Suppressed.**

The government informant Smith, after his release from jail in Los Angeles, went directly to Las Vegas for the sole and specific purpose of building a criminal case against Green and Pappas. Smith had previously engaged in smuggling activities with Pappas and Green and other persons who were not defendants in this case. After Smith arrived in Las Vegas, he was in constant contact with Customs' Agent Diaz. Following Agent Diaz' instructions, Smith wore a monitoring and transmitting device when he went to the Pappas-Green apartment. Customs agents were stationed in the apartment adjacent to the Pappas-Green apartment and received transmissions from the monitoring device worn by Smith.

During the trial, Smith testified to the conversations that he overheard while wearing the monitoring device in the apartment. Agents who were in the adjacent apartment did not testify or corroborate Smith's testimony nor were the recordings of the monitored conversations admitted into evidence. The petitioner Isbell filed a motion to suppress Smith's testimony concerning the apartment conversations, which was denied. No search warrant was issued which permitted Smith to transmit the conversations from the Pappas and Green apartment. Smith testified that he had not received permission to monitor the conversations in the apartment. The Ninth Circuit Court of Appeals did not reach the question as to whether Smith was required to have a search warrant before he could enter the Pappas and Green apartment wearing a monitoring

device, and decided that a party to a conversation may testify as to what transpired, although the conversation was recorded and transmitted. The government's purpose in equipping Smith with a transmitting or monitoring device was to gain prosecution evidence against the various defendants. No other reason existed for equipping Smith with a monitoring device. While the Ninth Circuit did not reach the questions, the Seventh Circuit in *United States v. White*, 405 F. 2d 838 (1939) cert. granted, 394 U.S. 957 (1969), touched the periphery of this question by holding inadmissible testimony of government agents concerning conversations that they heard through the use of an electronic monitoring device. The Fourth Circuit in *United States v. Missler*, 414 F. 2d 1293 (1969), held admissible testimony of officers who had concealed themselves in a government informant's apartment at the informant's invitation. There was no Fourth Amendment violation in *United States v. Kaufer*, 406 F. 2d 550, (2nd Cir. 1969), although the agent consented to carry a transmitting and recording device when he engaged in conversations with the defendant, not in the defendant's home but at a pre-arranged meeting place. There was no Fourth Amendment violation in *Holt v. United States*, 404 F. 2d 914 (10th Cir. 1968), where the informant testified as to bugged conversations and the recording was admitted into evidence to corroborate the informant's testimony. These decisions, taking as their starting point *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1968), each are distinguishable from petitioner's case.

Informant Smith, taped with a transmitting device, entered the Pappas and Green apartment without a

search warrant and without the consent of either Pappas or Green. Smith's sole purpose of being in the apartment was to gain evidence against Pappas, Green and anyone else. The fact that the recordings were not used in evidence is fortuitous. The privacy of the Pappas and Green apartment was invaded. The occupants of the apartment had the right to believe in the sanctuary of their apartment. The situation is not unlike the *Katz* situation, *supra,* and the electronic recording of the telephone conversation from a public telephone booth. In both instances, there was invasion of privacy. The warrantless intrusion of a wired informant violates a citizen's Fourth Amendment privacy.

**Conclusion.**

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

RAYMOND E. SUTTON,
*Counsel for Petitioner.*

## APPENDIX A.

### Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, vs. Bobby Randall Bates, Appellant. No. 24,777.

United States of America, Appellee, vs. Alan Randall Green, Appellant. No. 24,778.

United States of America, Appellee, vs. Clifford Darrell Isbell, Appellant. No. 24,779.

United States of America, Appellee, vs. Nicholas Emanuel Pappas, Appellant. No. 24,780.

[June 24, 1970]

Appeal from the United States District Court for the District of Nevada.

Before: HAMLIN, ELY and CARTER, Circuit Judges.

JAMES M. CARTER, Circuit Judge:

Appellants were convicted for their participation in a plan to fly a load of marihuana into the United States from Mexico. All appellants were found guilty of one count of conspiracy to unlawfully import marihuana. Appellants Green and Pappas were also found guilty of one count of unlawfully importing marihuana, 21 U.S.C. 176a and 18 U.S.C. 2. All appellants challenge their convictions on a variety of grounds. Four contentions merit discussion. None requires a reversal.

I. Motions to Suppress Evidence Made by Green and Isbell Were Properly Denied.

Smith, the government informer was equipped with a transmitting device. Conversations he had with the four appellants and others were transmitted and recorded under the supervision of customs agents. However, the recordings were not offered in evidence. Smith testified to the conversations.

A party to a conversation may testify to what transpired although the conversation was recorded or transmitted by electronic devices. *Lopez v. United States,* 373 U.S. 427 (1963); *On Lee v. United States,* 343 U.S. 747 (1952).

We do not reach the question as to the propriety of entering the recording in evidence or of using the testimony of agents who heard the conversation as it came over the transmitting device. The latter was the issue in *United States v. White* (7 Cir. 1969), 405 F.2d 838, cert. granted 394 U.S. 957 (1969), relied on by Green and Isbell. We find no error.

II. The Jury Was Properly Given the Entrapment Question.

Green and Pappas contend they were entrapped into the marihuana conspiracy by the government informer, Smith. Both testified in support of their contentions. The trial court treated the question as one of fact and properly instructed the jury as to the entrapment defense. The jury's verdict showed the jurors' disbelief of appellants' contention. Appellants now claim that the entrapment question was a question of law that the court should have resolved in their favor.

A reading of the evidence indicates the correctness of the trial court's actions. While it is conceded that Smith was instructed to assist in the apprehension of Pappas and Green, very little in his testimony suggests that the two were not willing participants in the smuggling scheme. Smith's testimony does not support appellants' contentions that they were extremely reluctant to enter the venture. Smith and his wife also testified as to prior drug dealings by the appellants.

We have held that entrapment is a question of law only where the evidence is substantially undisputed. *Enciso v. United States* (9 Cir. 1967), 370 F.2d 749. Here appellants presented a rather weak showing of entrapment which did not correspond to the account of the informer. The question was properly left to the jury.

III. There Was Sufficient Evidence to Convict Isbell.

Isbell contends that there was insufficient evidence to permit the jury to find him guilty on the conspiracy count. We disagree.

Informer Smith testified that appellant Pappas called long distance from Mexico after he had purchased the marihuana. Green answered the phone and Isbell answered on the extension. Both talked to Pappas. Isbell questioned Pappas about a party who came back up from Mexico. Isbell asked Pappas when he would be back. After the phone conversation ended, Isbell said that he was tired of the delay, that he had a lot of money invested in Nick Pappas, and that he wanted to go East for a job. He asked that when "this transaction transpired" and the money arrived it be given to his wife, who would take care of it. Green told Isbell not to worry because everything would be all right.

Evidence of a conspiracy must ordinarily be based on inference drawn from competent circumstantial evidence. *Miller v. United States* (9 Cir. 1967), 382 F.2d 583, 586, cert. denied 390 U.S. 984 (1968); *Diaz-Rosendo v. United States* (9 Cir. 1966), 357 F.2d 124, 129, cert. denied 385 U.S. 856 (1966). We believe that Isbell's telephone conversation and statements provided a sufficient showing of his participation in the conspiracy.

Smith also testified that the day before the phone conversation, he had talked with Green outside the presence of Isbell. Green told him that Isbell had put up the first money in the marihuana purchase venture. Counsel for Isbell objected to the introduction of this evidence and asked to make a motion outside the presence of the jury. Counsel then moved for a mistrial as to Isbell because the Government's bill of particulars had not placed Isbell within the conspiracy at the time Green made his statement to Smith. The judge denied the motion. A reading of the bill of particulars makes clear that the Government had not stated that Isbell entered the conspiracy after the date of the Green statement. The motion was thus properly denied.

On proper objection, the motion might have been granted because the statement of Green was evidently not made in furtherance of the conspiracy but as merely a recitation of past facts. As such, it would not be an exception to the hearsay rule and would not bind Isbell. This objection, however, was never raised.

The trial court at various times during the trial and in the final instructions to the jury properly and carefully instructed the jury that a defendant could not be found to be a conspirator on the basis of what some

other conspirator or co-defendant might have said about him. A finding of participation could only be based on testimony of the defendant's own acts and statements showing he knowingly and consciously joined the conspiracy. In the fact of these curative instructions, we are not faced with plain error under Fed. Rules Crim. Proc. 52(b).

IV. Isbell Was Properly Sentenced.

Isbell was convicted of a violation of Count 1 of the Indictment and sentenced to five years in prison. Count 1 stated in pertinent part that Isbell "did . . . conspire . . . to commit an offense against the United States, that is to knowingly and with intent to defraud the United States import . . . 300 kilograms of marihuana, in violation of Title 21, United States Code, Section (sic) 176(a)." The count specified thirteen overt acts and concluded with the language, "All in violation of Title 18, Section 371, United States Code."

Isbell contends that the trial court erred in sentencing him under 21 U.S.C. 176a rather than under 18 U.S.C. 371, the general conspiracy statute. Although Isbell concedes that the five year sentence he received, was authorized under either statute, he claims that he was denied the possibility of probation by being sentenced under §176a. The Government contends that despite mention of 18 U.S.C. 371, sentencing was required to be in accordance with 21 U.S.C. 176a. We agree with the Government's position.

21 U.S.C. 176a forbids a variety of acts relating to the introduction of marihuana into the United States. It also provides for the punishment of anyone who "conspires to do any of the foregoing acts". Faced with

two conspiracy statutes, one general and the other specific, the specific must control. *Tanksley v. United States* (8 Cir. 1963), 321 F.2d 647; *United States v. Galgano* (2 Cir. 1960) 281 F.2d 908, 910-11, cert. denied 366 U.S. 967 (1961); *Davis v. United States* (5 Cir. 1960), 279 F.2d 576; *Georges v. United States* (5 Cir. 1959), 262 F.2d 426, 431-32. As stated in *Davis* in connection with a narcotic conspiracy statute similar to 21 U.S.C. 176a: "Congress, when it enlarged the penalties, and prescribed minumum prison terms, for narcotic offenses, issued a command which is binding on the courts. The District Court was bound to impose sentence under 26 U.S.C.A. §7237 rather than under 18 U.S.C.A. §371, and the resulting sentence is not illegal." 279 F.2d at 578. This circuit has recently by order granting a writ of mandamus, voided a district judge's grant of probation to a defendant indicted and tried under 21 U.S.C. 176a but convicted and sentenced for a conspiracy under 18 U.S.C. §371 to violate 26 U.S.C. §4744a. *United States v. Real,* (No. 24,364, 2/10/70).

The transcript of sentencing further rebuts Isbell's claim. The trial judge observed that he would have imposed the same sentence, whether the sentence was under either §176a or §371. Therefore, Isbell would not have been given probation, and parole is now available under §176a as it always has been under §371.

Other matters raised by appellants have been considered and found to be without merit.

The judgments are Affirmed.